INDEX

Page

Interest of Amicus Curiae 1
Statement of the Case 2
Questions Presented 2
Reasons for Granting the Writ 3
Conclusion 10

CITATIONS

CASES:

Appeal of Girsch, 437 Pa. 237, 263 A.2d 395 (1970) 8

Art Neon Co. v. City and County of Denver, 357 F. Supp. 466 (D. Colo. 1973) 7

Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Cmwlth. 458, 275 A. 2d 702 (1971), *vacated* 285 A. 2d 501 (1972) 8

Bell v. Burson, 402 U.S. 535 (1949) 4

Berman v. Parker, 348 U.S. 26 (1954) 5

Buchanan v. Warley, 245 U.S. 60 (1917) 3

Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W. 2d 110 (1957) 8

City of La Mesa v. Tweed & Gambrell Planing Mill, 146 Cal. App. 2d 762, 304 P. 2d 803 (1957) 8, 9

City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954) 6, 7, 8, 9

City of Santa Barbara v. Modern Neon Sign Co. 189 Cal. App. 2d 188, 11 Cal Rptr. 57 (1961) 9

Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A. 2d 248 (1966) 6, 7

Fuentes v. Shevin, 407 U.S. 67 (1972) 4

Grant v. Mayor and City Council of Baltimore, 212 Md. 301, 129 A. 2d 363 (1957) 8

Index Continued

Page

Harbison v. City of Buffalo, 4 N.Y. 2d 553, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958) 8

Hoffman v. Kinealy, 389 S.W. 2d 745 (Mo. 1965) 4

Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930) 6

Livingston Rock & Gravel Co. v. County of Los Angeles, 43 Cal. 2d 121, 272 P. 2d 4 (1954) 8

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 3-4

Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896) 2

National Advertising Co. v. County of Monterey, 1 Cal. 3d 875, 83 Cal. Rptr. 577, 464 P. 2d 33 (1970) 8

National Bd. of YMCA v. United States, 395 U.S. 85 (1969) 3

Nectow v. Cambridge, 277 U.S. 183 (1928) 4

Norate Corp. v. Zoning Hearing Bd. of Adjustment, 417 Pa. 397, 207 A. 2d 890 (1965) 8

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 6, 7

People ex rel. Trust Co. of Chicago v. Village of Skokie, 408 Ill. 397, 97 N.E. 2d 310 (1951) 8

Snidach v. Family Finance Corp., 395 U.S. 337 (1969) 4

State ex rel. Dema Realty v. Jacoby, 168 La. 752, 123 So. 314 (1929) 6

State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied* 280 U.S. 556 (1929) 6

Swain v. Bd. of Adjustment of University Park, 433 S.W. 2d 727 (Texas Ct. of Civ. App. 1968) 8-9

Index Continued

Page

Town of Hempstead v. Romano, 33 Misc. 2d 315, 226 N.Y.S. 2d 291 (1962) 7, 8

Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909) 8

Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E. 2d 464 (1965) 6

Village of Belle Terre v. Boraas, 42 U.S.L.W. 4475 (April 1, 1974) (Marshall, J., dissenting) 5

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 4, 5

STATUTES AND ORDINANCES:

DENVER, COLO., REV. MUN. CODE §§ 613.5-5(4), 613.5-5(4) (a) (1971) 2

MISCELLANEOUS:

Z. CHAFEE, JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 45 (1952) 3

W. MCKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 1-112 (1905) .. 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1539

ART NEON CO., et al.,
Petitioners,

v.

THE CITY AND COUNTY OF DENVER, et al.

BRIEF ON BEHALF OF THE NATIONAL ELECTRIC SIGN ASSOCIATION, AS AMICUS CURIAE.

Counsel for all parties have consented in writing to the participation of the National Electric Sign Association as *amicus curiae* in support of the petition in the above-entitled case and to the filing of this brief.

INTEREST OF AMICUS CURIAE

The National Electric Sign Association is a non-profit trade association, composed of approximately eight hundred electric sign companies, who together comprise seventy-five percent of the electric on-premise sign industry in the United States.

Accordingly, the Association has a vital interest in the development of the law of land use.

The imposition of the Denver amortization ordinance, which was sustained by the court below, has resulted in a loss to the petitioners of approximately one million five hundred thousand dollars ($1,500,000). If this precedent remains undisturbed, every member of the Association operating in a political subdivision which has adopted or will adopt the amortization technique may incur losses of similar magnitude. Our concern is only partly economic. The Association's interest stems as well from a basic concern that the decision below reflects a fundamentally erroneous perception of the constitutional limits on land use regulation, with implications that reach far beyond the commercial sector.

Amicus urges that the issues presented in this case raise important questions of Federal constitutional law which have not been, but should be, decided by this Court.

STATEMENT OF THE CASE

Amicus adopts the "Statement of the Case" set forth in the Petition for Writ of Certiorari.

QUESTIONS PRESENTED

1. Is the amortization technique adopted by the Denver ordinance a constitutionally permissible device for land use regulation?[1]

2. If such an amortization technique is constitutionally permissible, what limits are imposed upon its use by the Fifth Amendment to the United States Constitution?[2]

---

[1] DENVER, COLO., REV. MUN. CODE §§613.5-5(4), 613.5-5(4)(a) (1971).

[2] The protection against governmental confiscation of private property, applicable only to the Federal Government by the terms of the Fifth Amendment, has been applied to state and municipal governmental bodies via the "due process" clause of the Fourteenth Amendment. Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896).

REASONS FOR GRANTING THE WRIT

I. The amortization technique upsets the required constitutional balance between permissible land use regulation and individual property rights.

The petition before the Court presents a striking manifestation of the conflict between two competing societal interests—that of the individual in the free and unfettered use of private property, and that of the community in reconciling the common weal with the inevitable divergence of individual choices.

The protection of the individual's right to acquire and retain property free from governmental incursion is a principle that antedates our own Constitution.[3] Moreover, the protections accorded by the Fifth Amendment apply to the use as well as to the ownership of property:

> "Property is more than the mere thing which a person owns. It is essential that it include the right to acquire, *use* and dispose of it. The Constitution protects *these essential attributes of property.*" *Buchanan v. Warley,* 245 U.S. 60, 74 (1917) (Emphasis added).

This Court has consistently rejected any invitation to dilute the protection provided property and its uses by the Fifth Amendment:

> "Ordinarily, of course, governmental occupation of private property deprives the private owner of his *use* of the property, and it is *this deprivation* for which the Constitution of the United States *requires compensation.* See, e.g., U.S. v. General Motors, 233 U.S. 373, 378, 89 L.Ed. 311, 318, 65 S.Ct. 357, 156 A.L.R. 390." *National Bd. of YMCA v. United States,* 395 U.S. 85, 92 (1969) (Emphasis added).

Indeed, the rights of "acquisition, enjoyment and alienation of property" have been termed "basic civil rights". *Lynch v. House-*

---

[3] The prohibition against governmental confiscation of private property constituted one of the Articles of the Magna Charta. See the discussion in Z. CHAFEE, JR., HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION 45 (1952); W. MCKECHNIE, MAGNA CHARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN 1-112 (1905).

hold Finance Corp., 405 U.S. 538, 544 (1972); *cf. Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Bell v. Burson*, 402 U.S. 535 (1949).

In contradistinction to the breadth of individual property rights is this Court's recognition that liberty can become license and that some room must be left for governmental attempts to reconcile the exercise of property rights with the community's interest in public health, safety and welfare. In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), this Court held that general or comprehensive zoning ordinances were appropriate mechanisms for effecting this reconciliation. Nonetheless, as this Court has recognized in subsequent decisions, an overly broad exercise of general zoning powers impinges upon the protection afforded by the Fifth Amendment. *See, e.g., Nectow v. Cambridge*, 277 U.S. 183 (1928). The question posed for resolution before this Court is where the amortization technique, sustained below, should be placed when the line is drawn between regulation and confiscation.

In deciding this question, this Court should realize that, stripped to its essentials, the amortization device employed by the Denver ordinance requires the termination of a use of property which was, prior to the ordinance's enactment, perfectly permissible and which retains demonstrable economic value, without tendering any compensation for the resultant loss. Viewed in the light of its operative effect, the techniques represents an attempt to accomplish tomorrow what could not constitutionally be done today:

> ". . . To our knowledge, no one has, as yet, been so brash as to contend that such a pre-existing lawful nonconforming use properly might be terminated *immediately*. In fact, the contrary is implicit in the amortization technique itself which would validate a taking *presently* unconstitutional by the simple expedient of *postponing* such taking for a 'reasonable' time." *Hoffman v. Kinealy*, 389 S.W. 2d 745, 753 (Mo. 1965).

The Court of Appeals for the Tenth Circuit failed to confront this consequence of the amortization technique in misplaced deference to the broad zoning powers of municipalities.

While this Court has indicated that deference should be accorded governmental judgments concerning proper land use allocation, *see Village of Euclid v. Ambler Realty Co., supra,* such deference neither implies nor includes abdication. "This Court has an obligation to insure that zoning ordinances, even when adopted in furtherance of such legitimate aims, do not infringe fundamental constitutional rights." *Village of Belle Terre v. Boraas,* 42 U.S.L.W. 4475, 4479 (April 1, 1974) (Marshall, J., dissenting).

The constitutional inquiry does not terminate, as did that of the Court below, with a determination that a particular zoning ordinance serves a permissible "public purpose". While it is well established that the range of "public purposes" properly pursued by municipal authorities is not to be narrowly confined, the existence of an appropriate public purpose by no means confers upon a municipality immunity from the prohibition against confiscation contained in the Fifth Amendment.

In this Court's landmark decision in *Berman v. Parker,* 348 U.S. 26 (1954), regarding the permissible scope of the "public purpose" doctrine, the following limitation was emphasized:

> "Once the object is within the authority of Congress, the right to realize it through the exercise of eminent domain is clear. For the power of eminent domain is merely the means to the end (Citations omitted).
>
> * * * *
>
> The rights of these property owners are satisfied when they receive that just compensation which the Fifth Amendment exacts as the price of the taking." *Id.* at 33, 36.

The legal and practical implications of the Tenth Circuit's decision are clear. The principle enunciated is that a municipality may determine that a use of property, formerly deemed acceptable,

must cease, without compensation, once it is perceived to be inconsistent with some "public purpose" and that the Fifth Amendment will not stand in the way. The practical implications are equally disturbing. Should the Denver City Council determine that the goals of reducing population density, transportation difficulties and pollution problems in downtown Denver would be furthered by limiting buildings to a height of five stories, and should it also require that all existing taller buildings either conform to the new requirement or be removed, at the owner's expense, by a date certain, such an ordinance would fall clearly within the bounds of the Tenth Circuit's decision. This example is not altogether fanciful. The amortization technique is enjoying increasing popularity, and has been applied to many property uses not traditionally viewed as nuisances.[4]

In sum, the principles embodied in the decision of the Court below represent an invitation to municipalities to circumvent Fifth Amendment protections, and constitute an unwarranted erosion of the principles which Mr. Justice Holmes stated for this Court in *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922):

> "The protection of private property in the Fifth Amendment . . . provides that it shall not be taken for [public] use without compensation . . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. *But that cannot be accomplished in this way under the Constitution of the United States. . . . We are in danger*

---

[4] *See, e.g.,* Eutaw Enterprises, Inc. v. City of Baltimore, 241 Md. 686, 217 A. 2d 348 (1966) (check cashing service); Village of Oak Park v. Gordon, 32 Ill. 2d 295, 205 N.E. 2d 464 (1965) (boarding house); Jones v. City of Los Angeles, 211 Cal. 304, 295 P. 14 (1930) (mental hospitals); State ex rel. Dema Realty Co. v. Jacoby, 168 La. 752, 123 So. 314 (1929) (drug store); State ex rel. Dema Realty Co. v. McDonald, 168 La. 172, 121 So. 613 (1929), *cert. denied,* 280 U.S. 556 (1929) (grocery store); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954) (plumbing supply business and "nonconforming buildings").

of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." Id. at 415 416 (Emphasis added).

II. Even if use of the amortization technique is not per se constitutionally impermissible, this Court should delineate the standards to be employed in determining when it may be utilized.

Amicus' position is that the amortization technique itself amounts to a taking of private property and is never constitutionally permissible, absent the payment of just compensation. Even if this Court were to conclude that amortization may properly be employed in some land use contexts, this would still not cure the vices of the decision below. By failing to either consider or indicate any limits on the use of the technique, the Tenth Circuit's decision invites the conclusion that amortization is constitutionally permissible regardless of the particular circumstances in which it is employed.

For example, wholly different constitutional considerations are raised when amortization is applied to property capable of conforming to the new requirements than when it is applied to property wholly incapable of so conforming, a distinction deemed important in several other decisions.[5] *See, e.g., Eutaw Enterprises, Inc. v. City of Baltimore,* 241 Md. 686, 217 A. 2d 348 (1966); *Town of Hempstead v. Romano,* 33 Misc. 2d 315, 226 N.Y.S. 2d 291 (1962); *City of Los Angeles v. Gage,* 127 Cal. App. 2d 442, 274 P. 2d 34 (1954). In the former situation, the operative effect of the device is more confidently viewed as regulation while the effect in the latter situation is clearly confiscation.

---

[5] The District Court specifically found that the petitioners' property was incapable of conforming to the new requirements of the Denver ordinance. Art Neon Co. v. City and County of Denver, 357 F. Supp., 466, 473 (D. Colo. 1973).

Similarly, no attempt was made to distinguish between amortization which permits relocation of the nonconforming use elsewhere within the municipality, and amortization which does not.[6] Other courts have viewed this distinction to be of critical constitutional significance. *See, e.g., National Advertising Co. v. County of Monterey,* 1 Cal. 3rd 875, 83 Cal. Reptr. 577, 464 P. 2d 33 (1970); *Harbison v. City of Buffalo,* 4 N.Y. 2d 553, 176 N.Y.S. 2d 598, 152 N.E. 2d 42 (1958); *Grant v. Mayor and City Council of Baltimore,* 212 Md. 301, 129 A. 2d 363 (1957); *Town of Hempstead v. Romano, supra*; *City of Los Angeles v. Gage, supra.*

Finally, the Tenth Circuit viewed amortization as "no more than notice to the owner and user of the sign that they have a period of time to make whatever adjustments or other arrangements they can . . . so used it contains no connotation of compensation or a requirement therefor." This anomalous view of amortization's function is contrary to almost every decision on the subject. *See, e.g., National Advertising Co. v. County of Monterey, supra; Livingston Rock & Gravel Co. v. County of Los Angeles,* 43 Cal. 2d 121, 272 P. 2d 4 (1954); *City of La Mesa v. Tweed & Gambrell Planing Mill,* 146 Cal. App. 2d 762, 304 P. 2d 803 (1957); *City of Los Angeles v. Gage, supra,* all of which required that the amortization period be "commensurate with the investment involved". Other criteria, all reflecting some relationship to value, investment, or remaining economic life, have also been enunciated by the courts. *See, e.g., Swain v. Bd.*

[6] Again, the District Court found that relocation was not an alternative open to the petitioners under the Denver ordinance.

[7] It should be noted that ordinances resulting in inability to relocate or in total prohibition have been invalidated by the courts. *See, e.g.,* Appeal of Girsch, 437 Pa. 237, 263 A. 2d 395 (1970); Norate Corp. v. Zoning Hearing Bd. of Adjustment, 417 Pa. 397, 207 A. 2d 890 (1965); Bzovi v. City of Livonia, 350 Mich. 489, 87 N.W. 2d 110 (1957); People ex rel. Trust Co. of Chicago v. Village of Skokie, 408 Ill. 397, 97 N.E. 2d 310 (1951); Varney & Green v. Williams, 155 Cal. 318, 100 P. 867 (1909); Beaver Gasoline Co. v. Zoning Hearing Bd., 1 Pa. Cmwlth. 458, 275 A. 2d 702 (1971), *vacated* 285 A. 2d 501 (1972).

of Adjustment of University Park, 433 S.W. 2d 727, 734 (Texas Ct. of Civ. App. 1968); *City of La Mesa v. Tweed & Gambrell Planing Mill, supra*; *City of Los Angeles v. Gage, supra.*

It is clear that amortization draws its sole possible justification from the principle that recovery of investment (during the amortization period) is a constitutionally adequate substitute for just compensation. The Tenth Circuit's view of the Denver ordinance would permit an amortization period bearing no relationship to the real economic life of the amortized property. Indeed, it would, taken to its logical conclusion, permit no amortization period at all. By disregarding the very rationale upon which amortization schemes have been based, the Tenth Circuit has opened the door to far more radical forms of municipal regulation. *Cf. City of Santa Barbara v. Modern Neon Sign Co.,* 189 Cal. App. 2d 188, 11 Cal. Reptr. 57 (1961).

CONCLUSION

The Tenth Circuit's decision represents an almost unlimited constitutional sanction for a land use allocation technique of increasing popularity. Its radical erosion of the just compensation requirements of the Fifth Amendment, viewed in the light of its probable consequences, clearly presents important and significant questions of Federal constitutional law that should be resolved by this Court. It is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

DANIEL J. McAULIFFE
By.....

DANIEL J. McAULIFFE
3100 Valley Center
Phoenix, Arizona 85073
602-257-7211
Attorney for Amicus Curiae

GUY G. GELBRON
BRUCE D. PINGREE
3100 Valley Center
Phoenix, Arizona 85073
602-257-7211

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May, 1974, three copies of the Brief of the National Electric Sign Association as Amicus Curiae were mailed first class, postage prepaid, to each of the following counsel:

ALAN A. ARMOUR
Counsel for Petitioners
Hoffman, Goldstein, Armour
& Lonnquist, P.C.
1234 Bannock Street
Denver, Colorado 80204

MAX P. ZALL
EARL T. THRASHER
ROBERT M. KELLY
Counsel for Respondents
City and County of Denver and
Anthony H. Jansen
City and County Building
1437 Bannock Street
Denver, Colorado 80202

RICHARD P. HOLME
Counsel for amicus curiae
Combined Communications Corporation
American National Bank Building
818 17th Street
Denver, Colorado 80202

LAWRENCE A. WRIGHT, JR.
RICHARD MAURO
HOWARD GELT
Counsel for amicus curiae consumers
2000 Gaylord Street
Denver, Colorado 80205

I further certify that all parties required to be served have been served.

May 10, 1974

DANIEL J. McAULIFFE

Daniel J. McAuliffe
SNELL & WILMER
3100 Valley Center
Phoenix, Arizona 85073

Attorneys for amicus curiae
National Electric Sign Association